88-2099

No.

Supreme Court, U.S.
FILED
JUN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JUGOMETAL ENTERPRISE FOR IMPORT & EXPORT OF ORES & METALS,
Petitioner

v.

MARCUS IRVING, JR. & FRANKIE IRVING,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. In products liability litigation, after this Court's four-four division in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), is a conclusion that it is "merely foreseeable" that a product will be used in the forum state a constitutionally-sufficient basis upon which to justify a finding of jurisdiction?

II. If "mere foreseeability" is the appropriate test to be employed, may the "awareness" component be properly applied to assert jurisdiction over a foreign entity only having knowledge of activities occurring at a port of entry in the United States and that the product alleged to have caused injury, asbestos, was to be used by one manufacturer whose location was not known and could not be ascertained?

III. If, as *Asahi* requires, sovereignty concerns create a higher jurisdiction barrier, what international factors are to be balanced against the interests of the forum in determining whether an exercise of jurisdiction is reasonable?

IV. Is the "stream of commerce" approach to personal jurisdiction applicable to a foreign entity which did not produce the product, never had title or physical possession and whose only role in connection with its entry into commerce was arranging for shipment to the United States and assuring compliance with the law of a foreign country?

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Combustion Eng.
Crown Cork & Seal
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Nicolet, Inc.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Jugometal Enterprise For Import & Export of Ores & Metals, requests that a writ of certiorari issue to review the judgment and opinion of the United States of Appeals for the Fifth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 864 F.2d 383 and may be found at App. 1a. The decision of the United States District Court is not reported and may be found at App. 46a. The Special Master's opinion is not reported and may be found at App. 14a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 2, 1989. A timely petition for rehearing or rehearing *en banc* was denied on March 29,

1989. App. 12a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner, Jugometal is located in Belgrade, Yugoslavia. A significant portion of its business is providing for and arranging technical and logistical services in connection with that country's imports and exports. During the relevant time frame, it was also licensed by Yugoslavia to assist in the export of goods manufactured or produced by that nation's businesses. Plaintiffs (Respondents) were employees of a Houston, Texas company, Uvalde Rock Asphalt Company (Uvalde) engaged in the manufacture of tile. They brought a diversity suit seeking damages for injuries allegedly received from handling asbestos supplied to Uvalde between 1955 and 1970. Jugometal was one of twenty-one alleged suppliers of asbestos named as defendant in one hundred and six diversity cases now pending in the United States District Court for the Southern District of Texas. The company which mined the asbestos and placed it in containers for shipment on vessels bound for Houston, Stragari Mines of Yugoslavia, was not named as a defendant.

Due to the inordinate number of years which have elapsed, development of a complete record of events and the roles and responsibilities of those involved proved difficult.[1] It is not disputed that sometime in 1953 or

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[1] It is not contested that Jugometal's business records relating to this transaction were destroyed pursuant to Yugoslavian regulations bearing on documents having an age in excess of ten years. The major portion of the instant record, therefore, is based on

1954, the president of Huxley Development Company (Huxley)[2] visited Jugometal's one-person office in New York City.[3] At that time he was informed that Stragari asbestos was available for the United States' market. After locating Uvalde as a potential purchaser, he went to Yugoslavia to negotiate a contract. Since Yugoslavian law prohibited the export of products by companies, like Stragari, that were not registered for foreign trade business transactions, Stragari retained Jugometal.

Negotations resulted in the drafting of two contracts. The first was entered into by Jugometal, on behalf of Stragari, with Huxley. It specified the price, quality and quantity of asbestos to be sold and that the asbestos was to be shipped to the port of Houston in jute bags marked "Huxley/Houston." Under that contract, Huxley took legal possession once the material was placed on board ships in Yugoslavia. Testing of asbestos was to be performed by a company located in Houston and expenses incurred for this equally shared. The seller was responsible for expenses related to the return of bags.

The contract between Huxley and Jugometal was designed to meet the technical requirements of Yugoslavian law. For that reason, it denominated Jugometal, not Stragari, as the "seller."[4] The second contract, entered

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depositions taken in Yugoslavia of individuals still familiar with the transaction.

[2] The company is a brokerage business in New York City now in bankruptcy.

[3] This person, during all times relevant to the instant case, was the only representative of Jugometal present in the United States. Other than this isolated conversation, there is no evidence in the record that he, or Jugometal, actively solicited sales for Stragari asbestos, or any other product, anywhere in the United States.

[4] It remains undisputed that Yugoslavian law prohibited inserting terminology into contracts reflecting agency on behalf of non-registered entities exporting goods. Testimony elicited in deposi-

into by Jugometal and Stragari, was substantive in nature.[5] In this document, Stragari guaranteed quality, quantity, delivery time, price and all other terms and conditions found in the Jugometal/Huxley contract. It also provided that monies paid by Huxley for the asbestos were to be credited to Jugometal's account with the Yugoslavian Bank For Foreign Trade. After deduction of export fees and expenses (including those incurred for the return of bags and testing), Jugometal directed that dollars paid by Huxley be transferred in dinars (Yugoslavian currency) to a Stragari account.

It was Jugometal's responsibility to make shipping arrangements from Yugoslavian ports to Houston.[6] After Stragari packaged the asbestos (in bags marked "Huxley/Houston"), Stragari shipped the material by rail to be placed on board vessels bound for Houston. At that point, Huxley took title. It received the asbestos at the port of Houston, had the material tested, and sold it to Uvalde. During the period between 1955 and 1970, the sale of Stragari asbestos by Huxley to Uvalde resulted in a five dollar per ton profit to Huxley on sales of approximately five thousand metric tons a year. In contrast, Jugometal received somewhere between $2,500 and $3,750 annually from Stragari for the logistical and technical services provided.

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tions taken of corporate officials in Yugoslavia revealed that it was then common practice for registered exporters to employ the word "seller" when they were acting in the capacity of agent.

[5] Pursuant to Yugoslavian regulations, note 1, *supra*, this document is no longer in existence. Evidence concerning the intent and scope of the agreement was procured through deposition testimony taken in Yugoslavia.

[6] Commensurate with this responsibility, when a shipment was mistakenly delivered to New Orleans, it became Jugometal's, not Stragari's, responsibility to deal with the problem.

Huxley's president was the only person who had contact with Uvalde. When questioned during visits to Yugoslavia, his responses to queries concerning the ultimate purchaser were such that those dealing with him concluded that it was his "business secret" not to be shared with officials of Jugometal. Thus, other than knowing that Stragari asbestos was shipped to the Port of Houston, and that asbestos testing as well as "bag cleaning" also occurred in that city, Jugometal had no information concerning either the final destination of the product or its ultimate user.

On the basis of these facts, Jugometal filed a motion to dismiss contending that the district court lacked personal jurisdiction. The Special Master found that mere knowledge that asbestos was to be tested in Houston and bags cleaned there was an insufficient predicate on which to base an exercise of personal jurisdiction.[7] App. at 44a. In addition, he alluded to additional factors which supported the conclusion that an exercise of jurisdiction was unreasonable. The "unique burden" of defending itself in a "foreign legal system"; the "amount of commissions Jugometal realized . . . when compared to the exposure to significant damages"; and the "fact that no transactions have occurred between the parties since at least 1970 . . . [all made] it unreasonable to require" defense of the suit. *Id.* at 44a-45a.

The district judge adopted the Special Master's recommendation and affirmed. The court determined that "Jugometal did not have a purpose, commercial or otherwise, in Texas." *Id.* at 48a. The fact that testing and cleaning of bags occurred at the port of Houston was deemed insufficient to impute knowledge of the ultimate user: "That the asbestos's commercial stream stopped temporarily in Houston was entirely fortuitous." *Id.* As

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[7] The Special Master was also careful to point out that the president of Huxley had taken all steps necessary to insure that Jugometal did not learn the identity of the ultimate purchaser, Uvalde. App. at 41a.

such, "a Yugoslavian broker having no direct contacts with Texas should not be subject to the judicial power of this state merely because his customer's product ended up in Texas." *Id.* at 49a. Finally, and in keeping with the approach of the Special Master, international concerns coupled with the inequity of requiring Jugometal to respond to claims of such magnitude "more than fifteen years after it had stopped sending asbestos out of Yugoslavia under a contract with a New York buyer" warranted the conclusion that a jurisdictional exercise was unreasonable. *Id.* at 50a. The court certified the interlocutory order as appealable and stayed all one hundred and six cases pending a determination of the jurisdictional issue.

On appeal, the Fifth Circuit reversed. While agreeing that Yugoslavian law prohibited Stragari from exporting its own asbestos, obligations found in Jugometal's contract with Huxley, and not the facts of the actual transaction itself, were deemed important. The fact that Jugometal held itself out as a seller in the contract with Huxley; incurred responsibility for charges with respect to testing and bag cleaning; and accepted payments from Huxley, were noted as meaningful criteria for purposes of minimum contacts and purposeful availment of the Texas forum. *Id.* at 7a. Turning to somewhat cloudy secondary matters, the court alluded to the proposition that Jugometal "itself" conveyed asbestos to freight forwarders [8] and "stored" the material.[9] *Id.* In this context,

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[8] The record is clear that Jugometal never had legal title or physical possession of the asbestos. It was therefore impossible for the company, "itself," to convey anything. Since there are no records available and Jugometal concedes that it was responsible for making arrangements for shipment, there could have been instances in which business demands were such that the company used a freight forwarder to insure that its obligations to Stragari were met.

[9] The only "storage" that occurred within Yugoslavia may have been in warehouses owned by the port facilities during periods

the court determined that a sufficient nexus existed between the asbestos, Jugometal and Houston to warrant an exercise of jurisdiction under the "stream of commerce"/"foreseeability" test for personal jurisdiction. *Id.* at 6a, 7a-9a. The analysis pertaining to reasonableness was limited to noting that the "heavy burden" placed on Jugometal in defending was outweighed by the fact that the case involved Texas plaintiffs allegedly receiving injuries in the state. *Id.* at 10a. No mention was made of the intervening number of years. Jugometal's small commission, or the international consequences of a finding that Petitioner was subject to the district court's jurisdiction.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES THE ISSUE LEFT UNRESOLVED BY THIS COURT'S FOUR-FOUR DIVISION IN ASAHI METAL INDUS. CO., *LTD. v. SUPERIOR COURT* AND WITH RESPECT TO WHICH THERE CONTINUES TO BE A CONFLICT BETWEEN CIRCUITS AS WELL AS STATE COURTS OF LAST RESORT

In *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1988), Justice O'Connor wrote for four Justices and specifically rejected the Fifth Circuit's "mere foreseeability" test [10] in favor of an "additional conduct" approach to personal jurisdiction. In her view, for jurisdiction to attach, a defendant must have engaged in ac-

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when the asbestos (owned by and under the control of Stragari) was awaiting placement on board vessels. See app. at 41a (Special Master noting that Jugometal "arranged to store" the asbestos).

[10] The opinion cites Bean Dredging Corp. v. Dredge Technology, 744 F.2d 1081 (5th Cir. 1984), 480 U.S. at 111-112, the decision relied upon by the panel below. See app. at 6a, 7a-9a.

tivity indicating an intent or purpose to derive economic benefits from the market of the forum state:

> [F]or example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State.

[480 U.S. at 112.]

Justice Brennan, writing for another bloc of four Justices, argued that Justice O'Connor's position reflected a "marked retreat," 480 U.S. at 118 (Brennan, J., concurring in part and concurring in judgment), and contended that the "mere foreseeability" approach adopted by the Fifth Circuit was in accord with traditional concepts of Due Process. *Id.* at 117-20. The lower court, after noting the division, concluded that "[b]ecause [this Court's] splintered view of minimum contacts in *Asahi* provides no clear guidance . . . we [will] continue to guage Jugometal's contacts with Texas" under the foreseeability standard. App. at 6a.

The lower court's reaction to *Asahi* reflects the confusion which has followed the decision.[11] Although there is

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[11] Wiles v. Morita Iron Works Co., Ltd., 530 N.E.2d 1382, 1388, 1389 (Ill. 1988) ("extremely balkanized opinion . . . [and] it is not possible to determine . . . whether the broad or narrow version of the stream of commerce theory is correct."); Grange Ins. Ass'n v. Washington, 757 P.2d 933, 938 (Wash. 1988), *pet. for cert. denied*, 57 U.S.L.W. 3653 (U.S. April 4, 1989) (issue of "purposefulness" described as one this Court "has been unable to resolve."); Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2, 5 (Ariz. 1987) ("*Asahi* . . . may represent a slight retreat from the 'purposeful availment' test" previously enunciated); Witbeck v. Bill Cody's Ranch Inn, 411 N.W.2d 439, 448 (Mich. 1987) (noting that "[a]lthough the debate continues" Justice O'Connor's position is correct); Heins v. Wilhelm Loh Wetzlar Optical, 522 N.E.2d 989, 996

a serious issue as to whether the court properly applied the "mere foreseeability" test as perceived by Justice Brennan [12] (the basis for the second question presented), there is no question that the instant case squarely presents for decision that which was left unresolved in *Asahi*: is foreseeability or the "additional conduct" standard to be employed when jurisdiction is sought on the basis of a product having been placed in the stream of commerce? The compelling need to resolve the issue clearly warrants the grant of certiorari.

(Mass. App. Ct. 1988) (opinions in *Asahi* concern "subtleties of elusive definitions of . . . minimum contacts . . . ."); Loos v. American Energy Savers, Inc., 522 N.E.2d 841, 844 (Ill. App. 4 Dist. 1988) (*Asahi* holds that "mere awareness" cannot be equated with an "act purposefully directed toward the forum State."); Wessinger v. Vetter Corp., 685 F. Supp. 769, 777 (D. Kan. 1987) (although Court evenly divided, "courts and commentators" support Brennan approach), *Compare* Ag-Chem. Equip. Co. v. Avco Corp., 666 F. Supp. 1010, 1014 (1987), *vacated*, 701 F. Supp. 103 (W.D. Mich. 1988) (concluding that until *Asahi* split is resolved "it is incumbent upon this court to follow the lead of Justice Brennan and the Sixth Circuit.") *with* Andrews University v. Robert Bell Indus., Ltd., 685 F. Supp. 1015, 1019 (W.D. Mich. 1988) (noting that Sixth Circuit now appears to follow the O'Connor approach).

[12] The "foreseeability" test requires a threshold showing that the defendant "is aware that the final product is being marketed in the forum state . . . ." 480 U.S. at 117 (Brennan, J., concurring in part and concurring in judgment). The only evidence in the present record of "awareness" relates to testing of asbestos and cleaning of bags in Houston and the fact that knowledge of the location of the one company using Stragari asbestos was intentionally withheld from Jugometal officials. As noted, the district judge viewed testing and cleaning activities at the port of entry as "entirely fortuitous," and therefore insufficient to impute knowledge of the location of the ultimate user.

II. THE LOWER COURT'S FAILURE TO BALANCE THE INTERESTS OF THE FORUM AGAINST INTERNATIONAL CONCERNS IS DIRECTLY IN CONFLICT WITH ASAHI; WHAT THESE CONCERNS ARE PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT HERETOFORE BEEN DECIDED BY THIS COURT

Distinct from the question of placement of goods into commerce is the issue of the reasonableness of an assertion of jurisdiction. 480 U.S. at 113-4. Eight members of this Court in *Asahi* joined with that portion of Justice O'Connor's opinion finding that even if Asahi "purposefully availed" itself of the forum state, concepts of "fair play and substantial justice" defeated the "reasonableness of jurisdiction." *Id.* at 116 (Brennan, J., concurring in part and concurring in judgment). Specifically, as an alien defendant, Asahi warranted a more sensitive approach to minimum contacts since it was "other *nations* whose interests are affected by the assertion of jurisdiction." *Id.* at 115. In addition, "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." 480 U.S. at 114.

The "fair play and substantial justice" command of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), is the constitutional touchstone of due process. In keeping with this proposition, factors bearing on reasonableness were considered at an early stage when the Special Master noted the small commission earned by Jugometal (1% to 1.5%) and the significant number of years which had elapsed since the transaction. In addition, and pursuant to *Asahi*, he noted that the "unique burden placed upon a party who must defend oneself in a foreign legal system should be given significant weight . . . ." App. at 44a.

In his affirmance, the district judge also noted the unreasonableness of subjecting Jugometal to claims arising out of shipments which occurred fifteen years earlier. In keeping with *Asahi's* requirement that the forum court be mindful of the federal interest in maintaining foreign relations policies and to consider procedural and substantive policies of other nations whose interests might be affected by an assertion of jurisdiction, 480 U.S. at 115, he concluded:

> This parochial self-interest promoting the erosion of standards for jurisdiction will be counterproductive, even in the short term, because reciprocal relaxations by other jurisdictions could subject any locality's citizens to conflicting, simultaneous adjudications in other states. These American workers should not be subject to a Yugoslavian court's processes because of their use of Yugoslavia's products. Similarly, a Yugoslavian broker having no direct contacts with Texas should not be subject to the judicial power of this state merely because his customer's product ended up in Texas.

[App. at 49a.]

On appeal, the lower court chose to ignore concerns of fairness deemed important at the district court level; a minimal commission coupled with the significant length of time which has transpired since the transaction. Moreover, it limited *Asahi* to only require recognition of the "'significant weight' placed on parties who face litigation in a foreign legal system." App. at 10a. Accepting the fact that defense of the suit in the Houston forum would be burdensome, the court concluded that whatever difficulties were presented for Jugometal, they were outweighed by the fact that the case involved Texas plaintiffs seeking compensation for injuries allegedly incurred in the state. *Id* at 10a-11a.

The court's opinion is silent with respect to the proposition that *Asahi* creates a higher jurisdictional barrier

for alien defendants.[13] No reference was made to the issue of the international ramifications of an exercise of jurisdiction as discussed by the district judge. Nor were such matters as language barriers, distance, differences in legal systems, the unique role of Jugometal as a registered exporter for Yugoslavia, or the fact that destruction of business records pursuant to government regulations [14] placed Jugometal at a disadvantage in defending the suit considered of significant moment. The fact that no consideration was given these factors obviously disregards the mandate of *Asahi*. Beyond this, however, is that while *Asahi* requires consideration of international criteria, the opinion leaves unclear what these considerations are as well as the manner in which they are to be weighed.

The *Harvard Law Review*,[15] after noting that *Asahi* clearly requires that "cases involving defendants from foreign countries [be treated] differently from those involving domestic out-of-state defendants," points out that the decision "failed to specify exactly what policies it con-

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[13] In Wiles v. Morita Iron Works Co., Ltd., 530 N.E.2d 1382, 1386 (Ill. 1988), the Illinois Supreme Court concluded that even if "minimum contacts" had been established, they were not sufficient with respect to an alien defendant. Citing *Asahi*, the court pointed out that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Similarly, the Ninth Circuit, citing *Asahi*, concludes that "litigation against an alien defendant creates a higher jurisdictional barrier due to additional sovereignty concerns." Shute v. Carnival Cruise Lines, 863 F.2d 1437, 1446 (9th Cir. 1988). Accord, Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir. 1988) ("litigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state . . . .")

[14] See notes 1, 5, *supra*.

[15] Comment, *Supreme Court—Leading Cases*, 101 HARV. L. REV. 119, 260 (1987).

sidered to be at stake . . . ." [16] The conclusion: *Asahi* leaves "the impact of foreign policy concerns on jurisdictional issues uncertain," [17] and must be more "fully analyzed" in future cases.[18]

Similarly, in a major article on the issue of foreign defendants and exercises of jurisdiction, the authors have this to say concerning the reasonableness/alien defendant discussion in *Asahi*:

> So what does all this mean? First, we clearly are told that some specialized treatment of jurisdiction is appropriate when a nonresident alien is defending. No longer should the international character of the defendant simply be ignored. Second, the Court suggests that this special consideration is pertinent when determining fairness . . . But exactly what these special fairness concerns are, or how they operate, remain somewhat in question. In fact, the case does little to clarify existing law, other than to underscore that the problem of how to treat alien defendants is a real one.[19]

The failure by the lower court to consider international criteria in the context of determining if special circumstances exist which would make an assertion of jurisdiction unreasonable, conflicts with *Asahi*. In addition, the decision below presents an issue of law which must be, but has not heretofore been decided by this Court: what are the "special fairness concerns" that are applicable to suits involving aliens and how and in what manner are they to be applied in order to determine if an exercise of jurisdiction is proper? The lower court's conflict with

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[16] *Id.* at 268.

[17] *Id.*

[18] *Id.* at 269.

[19] R. Degnan & M.K. Kane, *The Exercise of Jurisdiction Over & Enforcement of Judgments Against Alien Defendants*, 39 HAST.L.J. 799, 811 (1988).

Asahi coupled with the questions which remain unanswered after that decision, warrant the grant of certiorari.

III. BY APPLYING THE "STREAM OF COMMERCE" APPROACH TO AN ENTITY HAVING NO DIRECT FINANCIAL INTEREST IN A PRODUCT CAUSING INJURY, THE LOWER COURT'S OPINION PRESENTS AND IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The panel decision is the first reported instance of any court concluding that *in personam* jurisdiction is proper over a defendant who is not the manufacturer, distributor, wholesaler or resaler of a product allegedly causing injury. There is no reported decision holding that an entity not having a direct, substantial financial or legal interest in a product, or its marketing, may be brought before a distant forum to be held accountable in a products-liability action. If not reversed, Jugometal, as well as companies similarly situated in Yugoslavia and other foreign countries, will be placed at a jurisdictional risk which far exceeds the economic benefits they receive.

The stream of commerce doctrine is premised on the belief that those who have a direct, financial interest in the ultimate sale of a product should not be able to insulate themselves by acting through intermediaries when generating profits in the forum state.[20] The doctrine thus

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[20] The factual background for development of the "stream of commerce" doctrine is fully documented. See, *e.g.*, Comment, *The Long-Arm Reach of the Courts Under the Effect Test After Kulko v. Superior Court*, 65 VA.L.REV. 175, 179 (1979), *citing*, Currie, *The Growth of the Long Arm: Eight Years of Extending Jurisdiction in Illinois*, 1963 U.ILL.L.F. 533; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV.L.REV. 1121 (1966); Comment, *In Personam Jurisdiction Over Non-Resident Manufacturers in Product Liability Actions*, 63 MICH. L.REV. 1028 (1965).

permits states to bring before their courts nonresidents who have legal responsibilities for the product, derive significant economic benefit from its sale and who, therefore, reasonably should anticipate being hauled into court in a state where injury occurs. It is this situation to which *Asahi* and all other decisions of this and the lower courts are addressed.

The real distribution chain in the instant case, *i.e.*, those who had a continuing direct financial and legal interest in the asbestos, went from Stragari (the producer of asbestos) to Huxley (the importer/purchaser) to Uvalde (the customer of Huxley which used the product). In exchange for a *de minimis* compensation and because of requirements imposed by Yugoslavian law, Jugometal only acted as an intermediary necessary for securing transportation and delivery of the product from Yugoslavia to the United States. This service, like those performed by freight forwarders or owners of commercial carriers (boats, trucks, trains, etc.) is not one designed to be caught up in the "stream of commerce" when suit is brought for injuries alleged to have been incurred from or by a serviced product.

The unique attempt to bring Jugometal into the Houston forum presents a fact situation never analyzed by this Court or a court of appeals.[21] Two district court decisions, however, lay the analytical framework. In *Ward v. Baltimore Stev. Co.*, 437 F. Supp. 941, 944 (E.D.Pa. 1977), the court reached the following conclusion with respect to asserted *in personam* jurisdiction over a freight forwarder sued for damages for injuries allegedly resulting from highly-toxic cargo:

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[21] *Cf.*, Hutson v. Fehr Bros., 584 F.2d 833 (8th Cir.), *cert. denied*, 439 U.S. 983 (1978) (injury from chain; company responsible for packaging not subject to *in personam* jurisdiction in forum where injury occurred); Donnely v. Copeland Intra Lenses, Inc., 87 F.R.D. 80 (E.D.N.Y. 1980) (eye injury; company sterilizing and packaging product not subject to forum-court's jurisdiction in impleader action).

> [W]hile it is quite reasonable from . . . a due process standpoint to subject a non-resident manufacturer, importer or distributor to jurisdiction wherever its products may cause harm, since to do so encourages those with a *substantial interest* in a product to be responsible for its safety, nevertheless, this justification is absent in the case of a freight forwarder who has no interest in the product other than to perform the purely ministerial task of arranging for its movement from one location to another. (Emphasis added)

The analysis in *Ward*, *i.e.*, those with "no interest" in a product other than its "movement from one location to another" cannot be hauled into court is contrasted with *Weber v. Johns-Manville Corp.*, 630 F. Supp. 285, 288 (D.N.J. 1986). In that case an alleged "broker" made arguments somewhat similar to those now presented by Jugometal. Finding the exertion of jurisdiction to be proper, the court detailed with exactness the defendant's responsibilities:

> Pacor [the "broker"] was intimately involved in the asbestos industry for a number of years as contractor, distributor, and fabricator. Its familiarity with the hazards and norms of the industry is evidenced by its practice of requiring employees working in areas of excessive dust and concentration to wear protective devices and respirators. Pacor was not an unsophisticated plyer of the trade . . . . [T]he mere broker label does not apply.

As a entity merely assigned the responsibility of facilitating the export of asbestos and a myriad of other Yugoslavian products, Jugometal was not "intimately involved in the asbestos industry." It was never a member of the direct, profit-motivated distribution chain established for the sale and distribution of Stragari asbestos. The cases designed to deal with manufacturers, distributors, wholesalers and retailers for purpose of a minimum contacts/due process analysis are therefore inapplicable.

As previously pointed out, taken to its logical conclusion, the lower court opinion can and will place Jugometal and companies similarly situated in a position of being held accountable by American courts for alleged injuries from innumerable products with respect to which there is no direct, continuing business interest. What is required, is factual recognition of the role which Jugometal played in the transporting of asbestos from Yugoslavia to the United States. Once done, Due Process criteria must be put in place which clearly set forth at what point export activities fall within the scope of jurisdictional risk. The issue is important, and not having heretofore been decided by this Court, warrants the grant of certiorari.

CONCLUSION

For the foregoing reasons, Petitioner requests that a writ of certiorari issue to review the decision by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-6272

MARCUS IRVING, JR. and FRANKIE IRVING,
Plaintiffs-Appellants,
v.

OWENS-CORNING FIBERGLAS CORP., *et al.*,
Defendants,

JUGOMETAL ENTERPRISE FOR IMPORT and
EXPORT OF ORES AND METALS,
Defendant-Appellee.

Feb. 2, 1989

Appeal from the United States District Court
for the Southern District of Texas

Brent M. Rosenthal, Dallas, Tex., for plaintiffs-appellants.

John H. Boswell, A. David Carlson, Holly H. Williamson, Houston, Tex., for defendant-appellee.

George C. Cochran, Professor of Law, University of Mississippi, University, Miss., Bernard Jaffe, New York City, for Jugometal Enterprises.

Before JOHNSON, DAVIS and JONES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Appellants Marcus Irving, Jr. and Frankie Irving appeal the district court's order dismissing their products liability suit against Jugometal Enterprise for Import and Export of Ores and Metals (Jugometal) for lack of personal jurisdiction. Because we conclude that the district court did have personal jurisdiction over Jugometal, we reverse and remand.

I.

This is one of 106 products liability actions pending in the Southern District of Texas that stem from employment-related exposure to asbestos at the Uvalde Rock Asphalt Company (Uvalde) in Houston. The various plaintiffs have sued twenty-one companies, including Jugometal, alleged to have supplied raw asbestos to Uvalde from the 1950's through the early 1970's.

Marcus Irving, a former Uvalde employee, sued Jugometal under strict liability, negligence and breach of warranty theories for respiratory injuries allegedly linked to his asbestos exposure at Uvalde. Jugometal, a Yugoslavian company, participated in supplying about 5,000 metric tons of Yugoslavian asbestos to Uvalde each year between 1956 and 1970. These purchases represented all of Uvalde's asbestos supply during this time. The supply chain involved four players: (1) Stragari Mine in Yugoslavia, which mined the raw asbestos; (2) Jugometal, a licensed trading company that introduced the asbestos to America; (3) Huxley Development Company, an American broker that bought the asbestos from Jugometal; and (4) Uvalde, who bought the asbestos from Huxley.

Yugoslavian trade laws prohibited Stragari from selling the asbestos to foreign countries; Jugometal, which had the necessary export licenses, sold the asbestos to

Huxley. This important fact is established by the only surviving contract from this supply chain, a contract between Huxley and Jugometal dated November 24, 1959; it identifies Jugometal as the "seller" and Huxley as the "buyer" of the asbestos. No evidence indicates that Jugometal, which was not qualified to do business in Texas and solicited no asbestos sales directly in Texas, knew Uvalde was the ultimate purchaser. Jugometal kept no offices, employees or property in Texas.

Jugometal shipped asbestos to the Port of Houston roughly every two months during this fifteen-year relationship. The Jugometal-Huxley contract required Jugometal to ship the asbestos C.I.F. in jute bags labelled "Houston-Huxley." Huxley and Jugometal agreed to split the cost of testing asbestos samples from each shipment at a Houston laboratory. The bags themselves were cleaned in Houston before being returned to Jugometal; Huxley paid the cleaning fee and then deducted the charges from its payments to Jugometal using "debit notes" that identified Houston Bag and Burlap as the cleaning company. According to deposition testimony, Jugometal and Stragari agreed that Jugometal would store the asbestos, ship it, prepare invoices for Huxley, collect on Huxley's letters of credit and transfer the payments to Stragari after deducting a one percent commission.

Jugometal filed a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(2), after which the parties conducted additional discovery on the issue. A special master appointed by the district court recommended that the court grant Jugometal's motion to dismiss; the court adopted the special master's recommendation and dismissed each of the 106 actions against Jugometal for lack of personal jurisdiction. The district court entered judgment under Rule 54(b) in this case and stayed the rest pending this appeal by the Irvings.

II.

The Irvings bear the burden of establishing personal jurisdiction over Jugometal. But they need only present a prima facie case for personal jurisdiction at this point because Jugometal predicated its motion to the district court solely on affidavits and depositions; the court did not hold an evidentiary hearing. *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1270-71 (5th Cir. 1983); *see also Data Disc, Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1284-86 (9th Cir.1977). We conclude that the Irvings have established the prima facie case for personal jurisdiction over Jugometal in the Southern District of Texas.

To establish jurisdiction in a diversity case such as this the plaintiff must satisfy both (1) the forum state's long-arm statute; and (2) the fourteenth amendment's due process requirements. *DeMelo*, 711 F.2d at 1264. These two steps collapse into one for our purposes because the Texas Supreme Court has established that the Texas long-arm statute, Tex.Civ.Prac. & Rem. Code § 17.042 (Vernon 1986), "reaches as far as the federal constitutional requirements of due process will permit." *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex.1985).

The due process clause permits a district court to exercise personal jurisdiction over nonresident defendants when (1) they have sufficient "minimum contacts" with the forum; and (2) the exercise of jurisdiction does not offend " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (citation omitted). The minimum contacts must arise from actions by which the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S.

462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985); *see Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). The district court exercises specific jurisdiction over actions related to the defendant's contacts, provided the contact sprang from the defendant's purposeful conduct rather than the plaintiff's unilateral activities. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559, 566-67, 62 L.Ed.2d 490 (1980); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir.1987).

In describing the degree of purposeful conduct necessary to satisfy the due process clause's minimum contacts prong, the Supreme Court has determined that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide Volkswagen*, 444 U.S. at 298, 100 S.Ct. at 567. The Court in that case rejected an argument that the plaintiffs' unilateral—and arguably foreseeable—action in driving their car into Oklahoma established personal jurisdiction there over the New York car dealer and the east coast wholesaler who sold it. *Id.* at 295-96, 100 S.Ct. at 566-67. The Court stressed that foreseeability for personal jurisdiction purposes turns on whether "the defendant's conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there." *Id.* at 297, 100 S.Ct. at 567.

In *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1988), the Supreme Court's most recent statement on personal jurisdiction, four justices favored a narrow interpretation of the stream of commerce doctrine in a case ultimately decided under the "fair play and substantial justice" prong of the due process test. Justice O'Connor's plurality opinion disagreed with one approach to stream of commerce,

which she associated with this court's opinion in *Bean Dredging Corp. v. Dredge Technology*, 744 F.2d 1081 (5th Cir.1984), in which "mere foreseeability . . . [establishes] personal jurisdiction if the defendant's product made its way into the forum State while still in the stream of commerce." *Asahi*, 480 U.S. at 110, 107 S.Ct. at 1032, 94 L.Ed.2d at 103. In contrast, Justice O'Connor advocated a requirement of "additional conduct" by the defendant to support personal jurisdiction under the stream of commerce theory. *Id.* 480 U.S. at 112, 107 S.Ct. at 1033, 94 L.Ed.2d at 104.

Nonetheless an equal number of justices, while concurring with the plurality's analysis under the due process test's second prong, refused to require a showing of "additional conduct" under the stream of commerce doctrine. *Id.* at 116-121, 107 S.Ct. at 1035-1038, 94 L.Ed.2d at 107-110. Because the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue, we continue to gauge Jugometal's contacts with Texas by the stream of commerce standard as described in *World-Wide Volkswagen* and embraced in this circuit. *See Bean Dredging*, 744 F.2d at 1083-84; *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 198-99 (5th Cir. 1980); *Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315, 1318 (5th Cir.1970). *But cf. Jetco Elec. Indus. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir.1973) (dictum suggests that "sufficient other contracts" necessary to support personal jurisdiction). To borrow *World-Wide Volkswagen*'s phrase, Jugometal reasonably should have anticipated being haled into a Texas court given its contacts with that forum.

The parties here argue at length about whether Jugometal is more properly characterized as an asbestos seller, wholesaler, broker, agent or some other variety of middleman in this distribution chain. The label attached to Jugometal's role in the distribution scheme is not the critical question. We look instead to Jugometal's essen-

tial contention that its role in this chain was too minor to vest the district court with personal jurisdiction under the stream of commerce doctrine.

Jugometal's effort to downplay its role does not persuade us. Jugometal argues in effect that it is an exporter for purposes of Yugoslavian law but not United States law. Given the Yugoslavian trade restrictions, Stragari could not export the asbestos. Jugometal took on that task, and in doing so held itself out as the seller in the Jugometal-Huxley contract. Deposition testimony from Huxley's former vice president established that Jugometal itself conveyed the asbestos to a freight forwarder for shipment to Houston. Jugometal shared the cost of quality-control testing by a Houston lab and received Huxley's debits for the bag-cleaning charges of another Houston company; moreover, Jugometal accepted payments for the asbestos and stored it. Without implying any conclusions about the importance of Jugometal's role for the merits of this product liability action, we conclude that these actions satisfy the due process test's minimum contacts prong.

Jugometal's ignorance of Uvalde's identity does not defeat the exercise of jurisdiction in Texas. Personal jurisdiction does not require certain knowledge of the user's identity. We have noted that even a non-resident defendant's out-of-state activities can establish the necessary minimum contacts if those activities have " 'reasonably foreseeable consequences' " within the forum state. *Bean Dredging*, 744 F.2d at 1083 (quoting *Quasha v. Shale Devel. Corp.*, 667 F.2d 483, 488 (5th Cir.1982)).

In *Bean Dredging*, this court held that a component manufacturer who was based in Washington state and injected its steel testing into the stream of commerce—including two castings used in construction of a defective dredge in Louisiana—had established sufficient contacts with Louisiana to permit personal jurisdiction there. The

component manufacturer sold the steel castings to a California manufacturer, which incorporated the castings in cylinders that it ultimately sold to a Louisiana shipyard. *Bean Dredging*, 744 F.2d at 1085. The component manufacturer never (1) knew where these two castings were used; (2) knew the end product into which the castings were incorporated; (3) sold directly to any Louisiana company; (4) solicited business in Louisiana; or (5) owned property in Louisiana. *Id.* at 1082. The component manufacturer's president did acknowledge, however, that his company's products could wind up anywhere in the United States once they entered the stream of commerce. *Id.*

In concluding that use of the components in Louisiana established sufficient minimum contacts for personal jurisdiction there, we noted that the Washington component manufacturer sought to reach at broad a market as possible. *Id.* at 1085. We also stressed that the component manufacturer placed no limit on the states in which its castings could be sold and used. *Id. See also Hedrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355, 1358 (9th Cir.1983), *opinion withdrawn in part on other grounds sub nom. Hedrick v. Pine Oak Shipping, S.A.*, 733 F.2d 1335 (9th Cir.1984) (defendant manufacturer performed an act related to the forum, Oregon, "when it produced a splice that it knew was destined for ocean-going vessels serving United States ports, including those of Oregon."); *Stabilisierungsfonds Fur Wein v. Kaiser, Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 203 (D.C.Cir.1981) (personal jurisdiction existed in Washington D.C. over Australian defendants who "arranged for introduction of their wine into the United States stream of commerce with the expectation . . . that their products will be shelved and sold at numerous local outlets in diverse parts of the country.") 2 Moore's Federal Practice 4.41-1[4.1] (1987).

Similarly, Jugometal authorized Huxley to drum up American buyers for Yugoslavian asbestos throughout the United States. Although this effort produced only one buyer, Houston-basted Uvalde, Jugometal nonetheless derived economic benefits from it and placed no geographic limits on Huxley's efforts. Moreover, Judgometal's contacts with Houston gave Jugometal more reason to foresee that its product was being sold in the forum state than the component manufacturer in *Bean Dredging*.

The *Bean Dredging* manufacturer knew only that its product could end up anywhere in the United States. Jugometal's fifteen-year history of bulk asbestos shipments to Houston, ties to the Houston testing laboratory, and knowledge that the shipping bags were cleaned in Houston all pointed to a user in Texas or its vicinity. Huxley underscored the importance of shipping to Houston when it billed Jugometal for the cost of forwarding a shipment mistakenly delivered to New Orleans. The scope of Judgometal's and Huxley's marketing effort, combined with Judgometal's explicit ties to Houston, constitute delivery of the asbestos into the stream of commerce such that Judgometal reasonably should have anticipated use of its product in Texas, which could have resulted in its being haled into court there.

Turning to the due process test's second prong, we conclude that the exercise of personal jurisdiction here does not offend traditional notions of fair play and substantial justice. In determining this fundamental fairness issue we must examine the (1) defendant's burden; (2) forum state's interests; (3) plaintiff's interest in convenient and effective relief; (4) judicial system's interest in efficient resolution of controversies; and (5) states' shared interest in furthering fundamental social policies. *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1033, 94 L.Ed.2d at 104; *World-Wide Volkswagen*, 444 U.S. at 292, 100 S.Ct. at 564.

The latter four factors all point to the exercise of personal jurisdiction over Jugometal, given that this litigation involves 106 consolidated asbestos suits against tweny-one defendants for alleged injuries arising in Texas and linked to the asbestos Jugometal distributed. Thus, Texas constitutes the most convenient and efficient forum in which to try these cases. Nor has Jugometal indentified any conflict between the interests of Texas and other states that would flow from the exercise of personal jurisdiction here.

Jugometal understandably stresses that it would carry a heavy burden as a Yugoslavian company defending these lawsuits in Texas. It also points to the Supreme Court's admonishment to give "significant weight" to the unique burdens placed on parties who face litigation in a foreign legal system. *Asahi*, 480 U.S. at 114, 107 S.Ct. at 1034, 94 L.Ed.2d at 105. But the Court also stated that "[w]hen minimum contacts have been established, often the intersets of the plaintiff and the forum will justify even the serious burdens placed on the alien defendant." *Id.* at 114-15, 107 S.Ct. at 1033-34, 94 L.Ed.2d at 105-06. We conclude that this is such a case.

The plaintiff in *Asahi*, a Taiwanese corporation that manufactured tire tubes, sought indemnity from its valve supplier, a Japanese corporation, in a California court. *Id.* at 105, 107 S.Ct. at 1027, 94 L.Ed 201 at 100. The tube manufacturer already had settled products liability claims filed against it in a California court by a California resident; only the indemnity action between one Japanese corporation and one Taiwanese corporation remained. *Id.* With this posture in mind, the Court noted that neither the forum nor the parties had a strong interest in resolving this dispute in California. *Id.* at 114, 107 S.Ct. at 1034, 94 L.Ed.2d at 106. This asbestos litigation, in contrast, involves Texas plaintiffs using a local forum to pursue compensation for alleged injuries that occurred in Texas. Under these facts we cannot say that the exercise

of personal jurisdiction in the Southern District of Texas would offend traditional notions of fair play and substantial justice.

The district court's order is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6272

MARCUS IRVING, JR. and FRANKIE IRVING,
Plaintiffs-Appellants,

versus

OWENS-CORNING FIBERGLAS CORPORATION, *et al.*,
Defendants,

JUGOMETAL ENTERPRISE FOR IMPORT AND
EXPORT OF ORES AND METALS,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2/02/89, 5 Cir., 198–, —— F.2d ——)

(March 29, 1989)

Before JOHNSON, DAVIS and JONES, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition

for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-84-1719

MARCUS IRVING, *et ux*,
Plaintiffs,

VS.

JUGOMETAL, *et al.*,
Defendants.

C.A. No. H-85-1597

ALEX AGUILAR,
Plaintiff,

VS.

JUGOMETAL, *et al.*,
Defendants.

C.A. No. H-85-1736

ROOSEVELT ALLEY, *et ux*,
Plaintiffs,

VS.

JUGOMETAL, *et al.*,
Defendants.

C.A. No. H-85-1599

GARVIN AUSTON,

Plaintiff,

VS.

JUGOMETAL, *et al.*,

Defendants.

C.A. No. H-85-1738

CHESTER BATTS,

Plaintiff,

VS.

JUGOMETAL, *et al.*,

Defendants.

C.A. No. H-85-1565

LONNIE BOGANY, *et ux,*

Plaintiffs,

VS.

JUGOMETAL, *et al.*,

Defendants.

C.A. No. H-83-6684

FRANK BRADEN,

Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,

Defendants.

C.A. No. H-83-6787

OTIS BRADEN,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1629

JOHNNY MARTIN BRANCH, *et ux,*
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2645

JAMES H. BELL, *ex ux,*
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1595

ARTHUR BIBBS, *et ux,*
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1740

JOE BURNETT, *et ux*,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-83-7104

WILLIE BURR AND ALVIN EDWARDS,
Plaintiffs,

VS.

JUGOMPTAL, *et al.*,
Defendants.

C.A. No. H-85-1799

CLARENCE BUSH, *et ux*,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1591

GROVER D. BUSH, *et ux*,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-2157

JOHN HENRY CARTER BRANCH,
Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1680

EDDIE MAE COOKS,
Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-82-2363

LEVONIA CLARK, SAFRONIA EVANS,
OPHELIA RANSBURG AND TIM JACKSON,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1969

NEHEMIAH COOPER, *et ux*,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1578

MURPHY CORMIER,

Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,

Defendants.

C.A. No. H-84-3080

WILLIE CROCKETT,

Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,

Defendants.

C.A. No. H-85-1596

RICHARD DILL, *et ux,*

Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,

Defendants.

C.A. No. H-85-2032

JIMMY M. DELANEY,

Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,

Defendants.

C.A. No. H-85-1800

HERMAN ECKFORD, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1968

JOHN WESLEY FENLEY, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1731

WILLIE FLOWERS, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-3117

PERCY FOSTER,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1967

DANIEL JOSE GONZALES, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1590

CHARLIE GRANT, JR., *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1587

HEWITT GRAY, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-3260

DAVID HILL,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2646

FLOYD HALL, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1745

CYRUS HOPE HOLIDAY,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2643

EULA HOLLEY,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2649

DOC HARDEN, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2650

EZRA HARRELL, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1581

FREEMAN JARDON,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-83-5152

LAMAR JOHNSON,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1708

MARY BRAXTON JOHNSON and ERVIN JOHNSON,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1434

MELLANIE JOHNSON,
Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2698

ODIE HUFF JOHNSON,
Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1588

SHEDRICK JOHNSON, JR., and EDDIE M. JOHNSON,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2096

EUGENE JULIUS JONES, *et ux*,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2644

JOE ETTA JONES,
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1612

TOMMIE JONES, *et ux,*
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1594

WILLIE DAVID JONES, *et ux,*
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-1588

ANTOINE JOSEPH, SR., *et ux,*
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-3352

EDWARD J. LEWIS,
Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1564

S.D. LIVINGSTON, *et ux,*
Plaintiffs,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2695

LONNIE B. LOTT,
Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1710

THURMAN MALLORY,
Plaintiff,

VS.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1709

CHARLES WILLIE MCCRAY, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1577

LEROY MCWRIGHT, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1743

HURPE MILES, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-3713

CLYDE NELMS, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1563

IKE NUNN, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2647

JAMES NUNN, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-3417

ROY NUNN, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1734

WILLIAM PARKER, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-3475

LEROY C. PENNIE, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1598

ALVIN PRUITT, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1711

JOE LEE REED,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-3476

HERMAN A. RICE, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2045

ALFRED RODRIGUEZ, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-3469

ALEX MARSHALL SADDLER, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-1984

DORIS JEAN SAMS,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1613

ROBERT L. SHEPARD,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2098

MELVIN S. SMITH,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2648

WILFORD ST. JULIAN, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-3714

CARL ST. JULIAN, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1567

SIDNEY STEWART, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1679

LAWRENCE TATUM, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1747

AMOS TELSEDE, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1566

WARDELL THOMPSON, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1579

JACK THORNTON, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. 85-1966

ARVINE WADDLE,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1580

DAVID WALDRUP, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1624

LEO KING WALKER, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1583
JERRY LEE WILLIAMS, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-1712

WILLIE WILLIAMS,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-1830

PORTER WILLIS, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-84-2037

ALEX YOUNG,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-85-2036

INOVIA YOUNG,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2972

JAMES ANDERSON, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2849

MATTHEW BARNES, JR.,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2855

BENJAMIN BROOKS,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2872

EARNEST CARRATHUS, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2973

OLIVER CHAMBERS,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2853

WILLIE C. DIXON, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2579

J.B. GATLIN,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-3549

ALVARO R. GARCIA, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2856

ETHEL LUCILLE HARRIS,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2846

HERBERT HAWTHORNE, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2854

LOUIS EDWARD IRVING,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2578

CHARLIE DOE JACKSON, JR.,
Plaintiff,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2576

LOVIE THOMPSON, Individually and as Personal Representative of the Heirs and Estate of Sam Thompson, Deceased,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2581

ANDREW WALDRUP,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

C.A. No. H-86-2457

CHARLES WESTMORELAND, *et ux*,
Plaintiffs,

vs.

CAREY CANADIAN MINES, *et al.*,
Defendants.

MEMORANDUM AND RECOMMENDATION

[Filed July 6, 1987]

Now pending before the Court is the Motion of Jugometal to Dismiss on the grounds that the Court lacks personal jurisdiction over it.

I.

Procedural History

Marcus Irving and his wife sued Jugometal and the other named Defendants for damages alleging that he sustained injuries as a result of his having been exposed to asbestos fibers manufactured and supplied by the Defendants to his employers, Uvalde Rock Asphalt a/k/a Azrock ("Uvalde") located in Houston, Texas. During all material times, Uvalde was a manufacturer of floor tiles that contained asbestos fibers.

When Jugometal filed its Motion to Dismiss it was supported by the affidavits of two of its corporate officers who stated that Jugometal as an enterprise organized and existing under the laws of Yugoslavia and, that it did not have the "minimum contacts" within the State of Texas upon which jurisdiction could be maintained.

Because the resolution of the jurisdictional issue would affect those pending cases listed above as well as others in which Judgometal has been named as a Defendant in Houston Division asbestos cases, the parties requested and were granted additional time to more fully develop the factual and legal aspects of the issue. After completing testimonial discovery in New York and Yugoslavia, Jugometal has supplemented its original brief in support of its Motion, and the Plaintiffs have filed their response thereto with authorities.

II.

Relevant Facts

Jugometal is a Yugoslavian entity whose principal business is the sale of ferrious and non-ferrous metals, chemicals and mining equipment in foreign markets. It does not maintain a place of business in Texas, has no assets or designated agent for service in Texas and has never had an officer, agent, employee or representative come to this State on business.

In approximately 1953, Mr. Adam Novak, an employee of the Huxley-Development Corporation ("Huxley"), a New York corporation, met with a Mr. Djurovic of Jugometal Enterprise for Import and Export of Pres and Minerals to discuss business opportunities in Yugoslavia. (Novak deposition at pp. 14 and 15.) During those discussions, Mr. Djurovic suggested that asbestos from the Stragari Mines ("Stragari") might constitute a marketable item. (Novak deposition at pp. 8 and 9.) Mr. Novak began to search for customers who would purchase the Stragari asbestos and in 1955 made such a contact with the Uvalde Asphalt Company in Houston, Texas. In 1956, Uvalde agreed to purchase approximately 5,000 metric tons per year of Stragari asbestos from Huxley for use in its floor tile manufacturing process and continued to do so for the next fifteen (15) years.

There is some factual dispute between the parties as to whether the negotiations concerning the price, quantity, quality and delivery of the asbestos were between Huxley and Stragari or Huxley and Jugometal. In any event, there exists a written agreement between Huxley and Jugometal dated November 24, 1959 wherein Huxley is designated as the "buyer" and Jugometal is designated as the "seller" of the asbestos. This agreement provides in pertinent part that Huxley would purchase a given quantity of asbestos per year of a certain grade and quality and at a designated price c.i.f. the Port of Houston. The agreement provided further that the asbestos would be shipped in jute bags labeled "Asbestos 7R(c), Products of Yugoslavia, Huxley, Houston"); that a letter of credit would be opened in favor of Jugometal thirty (30) days before each shipment for the full value of the material shipped; that a sample of the asbestos would be analyzed by a Houston laboratory for quality, and that the bags in which the asbestos was shipped would be cleaned and returned to Yugoslavia.

Judgometal contends that its role in all of these transactions was simply that of a traditional broker or freight

forwarder and that the seller of the asbestos in reality was Stragari. Jugometal explained that under the laws of Yugoslavia, Stragari was precluded from exporting the asbestos it mined for its own account even though it could and did negotiate the price, terms and conditions of the sales transactions involved herein. In its agreement with Stragari, Judgometal arranged to store the asbestos delivered to it by Stragari, made arrangements for the shipment of the asbestos to the Port of Houston from Yugoslavia, was responsible for invoicing Huxley, collecting on the posted letters of credit and crediting the receipt of such funds to the account of Stragari. For these services Jugometal received a commission of approximately one to one and a half percent of the sales price for each shipment.

This relationship continued until approximately 1969 or 1970. In almost every instance the asbestos was shipped to the Port of Houston and a sample analyzed for quality and content at the Shilstone Laboratory in Houston as required under the contract. The bags in which the raw asbestos were shipped were cleaned in Houston and returned to Yugoslavia. There is no evidence that Jugometal ever knew that the purchaser of the asbestos was a Houston based company. In fact, Huxley was careful not to identify its customer to Jugometal, presumably for fear that Jugometal might establish a direct relationship to its customer contrary to the interests of Huxley.

On the basis of these facts Jugometal argues that there has not been established the necessary "minimum contacts" with this State for the Court to exercise *in personam* jurisdiction over it. It argues further that to do so would be contrary to the traditional notions of fairness and justice in requiring a foreign entity to defend itself in a forum thousands of miles from its home.

The Plaintiffs, on the other hand, argue that these facts demonstrate that Judgometal's contacts with Texas are sufficient for this Court to exercise jurisdiction con-

sistent with federal due process. In particular, the Plainitffs stress the years of shipping tons of asbestos to the Port of Houston, Jugometal's knowledge that the asbestos would be laboratory tested in Houston, that the shipping bags were cleaned in Houston before return to Yugoslavia and that Jugometal profited handsomely from these transactions.

III.

Discussion

The Supreme Court of Texas defined the limits of the Texas Long Arm Statute in the case of *U-Anchor Advertising, Inc. v. N.H. Burt*, 553 S.W. 2d 760, 762 (Tex. 1977). The Court set forth the following three elements that must exist before jurisdiction over a foreign enterprise could be maintained:

1. The non-resident Defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
2. The cause of action must arise from, or be connected with such act or transaction; and
3. The assumption of jurisdiction by the forum must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relevant convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Thus, the facts in each case must be closely analyzed to determine whether a particular Defendant purposefully availed itself of the privilege of conducting business in the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed. 2d 1283 (1958).

Under the Due Process Clause an individual is protected from the binding judgments of a forum with which

he has no meaningful contacts, ties, or relations. *International Shoe Co. v. Washington*, 326 U.S. at 319, 66 S.Ct. at 160. In its most recent pronouncement on the subject of jurisdiction the Supreme Court in *Asahi Metal Inc. v. Superior Court of California, Solano County*, 107 S.Ct. 1025 (1987), stated that the *substantial connection*, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed. 2d 528 (1985), between a Defendant and the forum state necessary for a finding of minimum contacts must arise from action of the Defendant which is purposefully directed toward the forum State. The Court went on to hold as follows:

> "*The placement of a product into the stream of commerce, without more, is not an act of the Defendant purposefully directed toward the forum State.* Additional conduct of the Defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advise to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *But a Defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.* (Emphasis added.)

Applying these principals to the case at hand, the record evidence shows that no physical ties to Texas can be attributed to Jugometal other than the fact that the shipments of asbestos over a period of fifteen years were directed to the Port of Houston in almost every instance. Jugometal had no office, agents, employees, or property in Texas. It was not qualified to do business in Texas, and there is no evidence that it advertised or otherwise solicited business in Texas or that it ever knew the name

or location of Huxley's customer. The contract under which the parties operated was between Huxley, a New York entity and Jugometal. All communications were between Huxley and Jugometal and the shipments of asbsetos to the Port of Houston were at the direction of Huxley. The only other evidence of any significance bearing upon Jugometal's contact with Texas is that samples of the asbestos were tested at the Shilstone Laboratory in Houston and that the burlap bags in which the asbestos was shipped, were cleaned in Houston and thereafter returned to Yugoslavia. These facts are, in the opinion of the undersigned, insufficient to predicate an exercise of personal jurisdiction by this Court of the Defense Jugometal.

The Due Process Clause prohibits the exercise of personal jurisdiction under circumstances that would offend traditional notions of fairness and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In making the determination of reasonableness the Court must consider such factors as, the burden on the Defendant, the interests of the forum state, the Plaintiff's interest in obtaining relief, the interest of the judicial system in reaching resolution of controversies efficiently and the interest of the several states in furthering fundamental social policies. See, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980).

A consideration of these factors in the instant case would dictate the unreasonableness of exercising jurisdiction over Jugometal, even apart from the issue of the placement of goods in the stream of commerce. For example, Jugometal would be required to defend itself in some 128 cases many thousands of miles from its home, and in a foreign judicial system. As stated by the Supreme Court in *Asahi* at page 1034, the unique burden placed upon a party who must defend oneself in a foreign legal system should be given significant weight in assess-

ing the reasonableness of exercising long-arm jurisdictional over national borders. The amount of commissions Jugometal realized over the extended period in which Stragari asbestos was sold to Huxley when compared to its exposure to significant damages requested by the Plaintiffs, as well as the fact that no transactions have occurred between the parties since at least 1970 would, in the view of the undersigned, make it unreasonable to require them to defend these multiple law suits in this jurisdiction.

IV.

Conclusion

After careful review of the pleadings, evidence and authorities and for the reasons stated above, the undersigned is of the view that Jugometal has not transacted any purposeful activity within the State of Texas so as to justify the exercise of *in personam* jurisdiction over it. Moreover, to do so under these facts would offend the traditional notions of fairness and substantial justice.

It is therefore, RECOMMENDED that the Motion of Defendant Jugometal to Dismiss for Lack of Personal Jurisdictional be GRANTED.

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

Signed this the 6th day of July, 1977.

Respectfully submitted,

/s/ Ronald J. Blask
RONALD J. BLASK
Special Master

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-84-1719

MARCUS IRVING, *et al.*,

vs.

JUGOMETAL, *et al.*,

and in these cases

Civil Action No. H-85-1597	Civil Action No. H-84-3080
Civil Action No. H-85-1736	Civil Action No. H-85-1596
Civil Action No. H-85-1599	Civil Action No. H-85-2032
Civil Action No. H-85-1738	Civil Action No. H-85-1800
Civil Action No. H-85-1565	Civil Action No. H-85-1968
Civil Action No. H-83-6684	Civil Action No. H-85-1731
Civil Action No. H-83-6787	Civil Action No. H-84-3117
Civil Action No. H-85-1629	Civil Action No. H-85-1967
Civil Action No. H-85-2645	Civil Action No. H-85-1590
Civil Action No. H-85-1595	Civil Action No. H-85-1587
Civil Action No. H-85-1740	Civil Action No. H-84-3260
Civil Action No. H-83-7104	Civil Action No. H-85-2646
Civil Action No. H-85-1799	Civil Action No. H-85-1745
Civil Action No. H-85-1591	Civil Action No. H-85-2643
Civil Action No. H-84-2157	Civil Action No. H-85-2649
Civil Action No. H-85-1680	Civil Action No. H-85-2650
Civil Action No. H-82-2363	Civil Action No. H-85-1581
Civil Action No. H-85-1969	Civil Action No. H-83-5152
Civil Action No. H-85-1578	Civil Action No. H-85-1708

Civil Action No. H-85-1434
Civil Action No. H-85-2698
Civil Action No. H-85-1588
Civil Action No. H-85-2096
Civil Action No. H-85-2644
Civil Action No. H-85-1612
Civil Action No. H-85-1594
Civil Action No. H-84-1588
Civil Action No. H-84-3352
Civil Action No. H-85-1564
Civil Action No. H-85-2695
Civil Action No. H-85-1710
Civil Action No. H-85-1709
Civil Action No. H-85-1577
Civil Action No. H-85-1743
Civil Action No. H-85-3713
Civil Action No. H-85-1563
Civil Action No. H-85-2647
Civil Action No. H-84-3417
Civil Action No. H-85-1734
Civil Action No. H-84-3475
Civil Action No. H-85-1598
Civil Action No. H-85-1711
Civil Action No. H-84-3476
Civil Action No. H-85-2045
Civil Action No. H-84-3469
Civil Action No. H-84-1984
Civil Action No. H-85-1613
Civil Action No. H-85-2098
Civil Action No. H-85-2648
Civil Action No. H-85-3714
Civil Action No. H-85-1567
Civil Action No. H-85-1679
Civil Action No. H-85-1747
Civil Action No. H-85-1566
Civil Action No. H-85-1579
Civil Action No. H-85-1966
Civil Action No. H-85-1580
Civil Action No. H-85-1624
Civil Action No. H-85-1583
Civil Action No. H-85-1712
Civil Action No. H-84-1830
Civil Action No. H-84-2037
Civil Action No. H-85-2036
Civil Action No. H-86-2972
Civil Action No. H-86-2849
Civil Action No. H-86-2855
Civil Action No. H-86-2872
Civil Action No. H-86-2973
Civil Action No. H-86-2853
Civil Action No. H-86-2579
Civil Action No. H-86-3549
Civil Action No. H-86-2856
Civil Action No. H-86-2846
Civil Action No. H-86-2854
Civil Action No. H-86-2578
Civil Action No. H-86-2974
Civil Action No. H-86-2338
Civil Action No. H-86-3235
Civil Action No. H-86-2577
Civil Action No. H-86-2487
Civil Action No. H-86-2580
Civil Action No. H-86-2857
Civil Action No. H-86-2847
Civil Action No. H-86-2576
Civil Action No. H-86-2581
Civil Action No. H-86-2457

MEMORANDUM ON DISMISSAL OF JUGOMETAL

[Filed Nov. 9, 1987]

In 106 cases, workers have sued a Yugoslavian export broker for injuries that resulted from their exposure to the exported asbestos while they were working for a Texas company that processed it in a Houston plant. Jugometal, the broker, has moved to dismiss for a lack of personal jurisdiction. The actions against Jugometal will be dismissed.

To limit the costs, one case will be certified for an interlocutory appeal, and the other cases will be stayed until that appeal is decided. The master appointed to assist the court in the management of its asbestos cases has filed his findings, conclusions, and recommendation, to which the parties have responded. The master's memorandum will be adopted.

There is no occasion to review the master's factual findings because the parties disagree only about the legal significance of the facts.

Stragari Mines mined the asbestos in Yugoslavia; Jugometal Enterprise and Import Ores and Metals brokered it to Huxley Development Corporation in New York; Huxley brokered it to Uvalde Asphalt Company; and the workers were injured by their contact with asbestos at Uvalde in Houston. Jugometal distributed Stragari's products without any geographic limitations. That the asbestos's commercial stream stopped temporarily in Houston was entirely fortuitous. Jugometal did not have a purpose, commercial or otherwise, in Texas; when the asbestos left Yugoslavia, Jugometal's sole interest was in getting paid.

The question presented in these cases is: Has Jugometal acted so that it is fairly subject to the judicial power of Texas? The classical condition for the exercise

of personal jurisdiction is physical power over the person. When the actual presence of the defendant is lacking, juridical power has been recognized if the defendant either (a) has pervasively been associated physically with the state in general or (b) has materially been associated with the state in the transaction at suit, if the exercise of power over the absent defendant in either of those instances under the circumstances is not otherwise unfair logistically, procedurally, or substantively.

Of course, delivery of a notice of the action to the defendant in a manner that provides a meaningful opportunity to respond to the suit is also required, but in these cases that initial step is not the critical issue.

As the American and the world economies have become increasingly interdependent, there has been a tendency to ignore the traditional basis of jurisdiction and to exert power casually. This parochial self-interest promoting the erosion of standards for jurisdiction will be counterproductive, even in the short term, because reciprocal relaxations by other jurisdictions could subject any locality's citizens to conflicting, simultaneous adjudications in other states. These Americans workers should not be subject to a Yugoslavian court's processes because of their use of Yugoslavia's products. Similarly, a Yugoslavian broker having no direct contacts with Texas should not be subject to the judicial power of this state merely because his customer's product ended up in Texas.

An argument is made that the sheer volume of 5,000 metric tons per year from Yugoslavia is such a substantial volume of material that jurisdiction is justified predicated on that aspect of Jugometal's conduct; however, from 1965 to 1979 the United States imported more than 476,000 metric tons annually,[1] which would suggest

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[1] Statistical Abstract of the United States, 1980, 101st ed., U.S. Department of Commerce, Bureau of Census.

that Jugometal's business was not a significant portion of the nation's asbestos importation trade.

To subject Jugometal to a claim for damages of this magnitude by plaintiffs in Texas more than fifteen years after it had stopped sending asbestos out of Yugoslavia under a contract with a New York buyer under the personal jurisdiction of a Texas court offends traditional notions of fair play and substantial justice.

Signed on November 9, 1987, at Houston, Texas.

/s/ Lynn N. Hughes
LYNN N. HUGHES
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUL 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2099

In The

Supreme Court of the United States

October Term, 1988

JUGOMETAL ENTERPRISE FOR IMPORT AND EXPORT OF ORES AND METALS,

Petitioner,

v.

MARCUS IRVING, JR. AND FRANKIE IRVING,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a products liability case based on injuries that occurred in the forum, does the foreign supplier that shipped directly into the forum the product that caused the injury have sufficient contact with the forum to allow the constitutionally permissible exercise of personal jurisdiction over the supplier by the forum?

2. Is it "fair and reasonable" for the forum to exercise personal jurisdiction over an alien defendant that has systematically shipped large amounts of its products into the forum for many years, in a suit based on injuries caused by the defendant's products in the forum?

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BRIEF IN OPPOSITION

Respondents Marcus Irving, Jr. and Frankie Irving respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

This is a products liability case in which plaintiff Marcus Irving, Jr.[1] alleges that he sustained respiratory injuries as a result of his exposure to raw asbestos while employed by the Uvalde Rock Asphalt Company (Uvalde) in Houston, Texas from 1955 through 1970. Although twenty-one companies were originally named as defendants in the action, discovery revealed that all the asbestos used at the Uvalde plant from 1955 through 1970 was supplied by petitioner, Jugometal Enterprise for Import and Export of Ores and Metals (Jugometal). The asbestos was sold by Jugometal, an independent Yugoslavian company, to Huxley Development Company (Huxley), an American broker, for immediate resale to Uvalde. Under the contract of sale that it executed with Huxley,[2] Jugometal shipped about 5,000 metric tons of Yugoslavian asbestos per year to the Port of Houston. Jugometal made shipments every two months, and thus arranged for approximately ninety shipments of asbestos to Houston over the fifteen year period.

It is true, as Jugometal states in its petition, that Huxley never advised Jugometal of the identity of the

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[1] In all, 106 plaintiffs have brought similar claims against Jugometal in federal district court in Houston. The district court stayed all of the claims pending resolution of the jurisdictional issue raised in this case.

[2] Although the contract was negotiated and executed in Yugoslavia, it was drafted in English, provided that disputes under the contract were to be resolved under the rules of the American Arbitration Association, and conferred jurisdiction on the courts of New York.

ultimate user of the asbestos that Jugometal had shipped to Houston, presumably for fear that Jugometal would establish a direct relationship with the ultimate user and eliminate the need for Huxley's services as an intermediary. Jugometal was aware at all times, however, of the significant role that Houston played in the transaction. Most obviously, the sales contract executed by Jugometal expressly required that Jugometal ship the asbestos to the Port of Houston in jute bags marked "Huxley/Houston." Jugometal knew that it was critical that it ship the asbestos to Houston and not some other port of entry; on one occasion, when it mistakenly shipped the asbestos to New Orleans, Jugometal was billed for the cost of forwarding the asbestos to Houston. The sales contract also expressly provided that the asbestos would be tested for quality by a Houston laboratory, and that Jugometal would bear half the cost of the testing. Pursuant to the contract, the jute bags in which the asbestos was shipped were returned to Jugometal for reuse; Jugometal was aware that the bags were cleaned before their return by a Houston company. Thus, in spite of Jugometal's ignorance of the precise identity of the user of its raw asbestos shipped to Houston, the strong ties of the transaction to Houston "all pointed to a user in Texas or its vicinity." Petitioner's appendix at 9a.

Despite this evidence that Jugometal purposefully availed itself of the privilege of conducting business in Texas by shipping literally thousands of tons of raw asbestos into the state every year for fifteen years for a profit, Jugometal challenged the ability of the district court to exercise personal jurisdiction over it. In its plead-

ings, Jugometal claimed that it had not maintained "minimum contacts" in the state of Texas sufficient to allow the district court to exercise jurisdiction over it, and claimed that requiring it to respond to suit in that forum would offend traditional notions of fair play and substantial justice. In an effort to establish a factual basis for its motions, Jugometal noticed and took the depositions of five of its officers in Yugoslavia. After briefing by the parties, the special master appointed by the district court to supervise pretrial proceedings recommended that the motion to dismiss filed by Jugometal be granted, and the district court adopted the recommendation.

A unanimous panel of the Fifth Circuit reversed. The court found that "Jugometal reasonably should have anticipated being haled into a Texas court given its contacts with that forum." Petitioner's appendix at 6a. The court also concluded that the assertion of jurisdiction by a Texas court in a case "involv[ing] Texas plaintiffs using a local forum to pursue compensation for alleged injuries that occurred in Texas" (petitioner's appendix at 10a) did not offend traditional notions of fair play and substantial justice. The panel remanded the case to the district court for disposition on the merits. Following denial of Jugometal's request for rehearing en banc, Jugometal filed its petition for a writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT, SUMMARY OF ARGUMENT

The strong facts of this case favoring the exercise of jurisdiction over Jugometal by a Texas court make this

case unworthy of Supreme Court review. Jurisdictional discovery revealed that Jugometal shipped approximately 75,000 tons of asbestos to the Port of Houston over a fifteen year period, and that it had every reason to know that its asbestos was being handled and used in Houston or its vicinity. The Fifth Circuit correctly concluded that Jugometal had thereby purposefully availed itself of the privilege of conducting activities in Texas, subjecting itself to the jurisdiction of the courts of that state.

Respondents do not dispute that *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986) leaves open the question of whether the entry of a defendant's product into a state, without more, subjects the defendant to the exercise of jurisdiction by the courts of that state. But that question is not raised by this case. Instead, this case raises the question of whether a defendant that delivered its products directly into the forum state for many years, with a reasonable anticipation that the products would be used there, can be haled into court in that state on causes of action arising from alleged defects in those products. The Fifth Circuit's answer to that question is consistent with the jurisdictional principles reaffirmed in *Asahi*, and does not conflict with any decision of a federal court of appeals or a state court of last resort. The correctness of the Fifth Circuit's decision is so clear that certiorari should not be granted.

Petitioner's contention that the Fifth Circuit panel failed to accord adequate weight to Jugometal's status as an alien defendant in determining the reasonableness of a Texas court's exercise of jurisdiction over Jugometal in this case is simply wrong. The court explicitly acknowledged *Asahi's* requirement that it give significant weight

to the burdens encountered by an alien defendant forced to defend itself in a foreign legal system in evaluating the fairness of asserting jurisdiction over Jugometal. But the court, following *Asahi*, concluded that the interests of the local plaintiffs and of the forum state in this case outweigh even the burdens that might be placed on Jugometal in requiring it to defend the action in Texas. The Fifth Circuit properly applied the clear language of *Asahi* to the facts of this case and arrived at a logical and legally unassailable result. Whatever the confusion engendered by the *Asahi* opinion, Supreme Court review of the Fifth Circuit's analysis in this particular case would be unhelpful, and is not warranted.

Finally, Jugometal asks this court to grant review based on its limited financial interest in the products entering the jurisdiction. The Fifth Circuit, of course, rejected Jugometal's contention that its role in the shipment of asbestos to Uvalde was too minor to allow a Texas court to exercise personal jurisdiction over it. Jugometal was actually designated in the sales contract as the seller of the raw asbestos, and was itself responsible for performance under the contract. The Fifth Circuit's conclusion that Jugometal's involvement in the transaction was significant enough to support the exercise of jurisdiction over it by a Texas court is supported by the evidence, and should not be the subject of discretionary review.

ARGUMENT

I. THE "MINIMUM CONTACTS" ISSUE LEFT OPEN BY *ASAHI* WOULD NOT BE RESOLVED BY REVIEWING THE FIFTH CIRCUIT'S DECISION IN THIS CASE.

Petitioner Jugometal suggests that this Court should review the Fifth Circuit's decision in this case in order to resolve the question of whether the foreseeable entry of a defendant's product into the forum state, without more, is enough purposeful activity in the forum state to enable the forum to exercise jurisdiction over the defendant. As Jugometal points out, in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986), Justice O'Connor, joined by three Justices, expressed the view that additional conduct directed to the forum by the defendant is required to enable the exercise of jurisdiction; an equal number of Justices disagreed, holding that the foreseeable entry of the product into the forum state is sufficient. Were this Court to accept certiorari in this case, however, the issue would remain unresolved. Even under the "additional conduct" test advocated by Justice O'Connor, Jugometal has sufficient contacts with the state of Texas to support the exercise of personal jurisdiction over it by a Texas court. Therefore, the competing principles discussed in the *Asahi* opinions cannot be refined, or even be usefully reviewed, in this case.

The degree of Jugometal's contact with the forum state in this case can best be illustrated by comparing the jurisdictional facts of this case with those in *Asahi*. *Asahi* involved an attempt by the California court to exercise jurisdiction over a Japanese manufacturer (Asahi) who

had sold a product component to a Taiwanese manufacturer (Cheng Shin), who included the component in a product which eventually entered and caused injury in California. The sale took place in Taiwan, and Asahi shipped the product from Japan to Taiwan. 480 U.S. at 114. While Asahi was aware that Cheng Shin sold its products "throughout the world," *Id.* at 106-07, and thus could have foreseen that its components would enter California, it had no direct knowledge of any activities undertaken on its behalf in California and "did not create, control, or employ the distribution system that brought its valves to California." *Id.* at 112.

In contrast, in the instant case, Jugometal shipped thousands of tons of raw asbestos directly to Houston, Texas annually for fifteen years. The entry of its asbestos into Texas was not fortuitous or arbitrary, but was intended by Jugometal. Unlike Asahi, Jugometal purposefully sent its products directly to the forum state. Clearly, Jugometal's "additional conduct" of intentionally shipping its products directly into the forum state would justify the exercise of jurisdiction over Jugometal by the courts of the forum even under Justice O'Connor's more rigorous "minimum contacts" analysis.

Review of the Fifth Circuit's decision in this case would not clarify the constitutional limits on the exercise of personal jurisdiction over a foreign supplier, since Jugometal's contacts with Texas unquestionably satisfy even the stricter of the two proposed standards. Resolution of the *Asahi* split should therefore await presentation of an appropriate case.

II. THE FIFTH CIRCUIT ADEQUATELY CONSIDERED THE BURDEN ON THE ALIEN DEFENDANT IN CONCLUDING THAT THE EXERCISE OF JURISDICTION OVER JUGOMETAL BY A TEXAS COURT IS REASONABLE.

In *Asahi*, this Court recognized "the unique burdens placed upon one who must defend itself in a foreign legal system," 480 U.S. at 114, in holding that the assertion of jurisdiction over the Japanese defendant by the California court was unreasonable and violated the Due Process Clause. Perhaps anticipating the type of jurisdictional challenge asserted in the case at bar, however, the Court also observed that "often the interest of the plaintiff and the forum will justify even the serious burdens placed on the alien defendant." *Id.* The Fifth Circuit properly found the interests of the local plaintiffs and of Texas to far outweigh any arguable burden placed upon Jugometal in requiring it to defend the claim in the place where it shipped its products and where the products caused injury.

Again, a comparison of the jurisdictional facts in *Asahi* and those in the instant case demonstrates the strength of the Fifth Circuit's holding that the exercise of jurisdiction in this case is reasonable and comports with due process requirements. In *Asahi*, neither party to the litigation was a resident of the forum; the transaction upon which the suit was based occurred entirely in a foreign country or countries; the applicability of foreign law was a strong probability, if not a certainty; and the inconvenience of litigating the case in the forum was apparent. 480 U.S. at 114-15. In the instant case, plaintiffs (joined by over 100 other plaintiffs, all claiming similar

injuries resulting from Jugometal's conduct) are citizens of the forum; the injuries occurred in the forum; the applicability of the law of the forum is indisputable;[3] and the majority of witnesses to the transaction upon which suit is based reside in or near the forum. Unlike *Asahi*, this case presents all of the facts necessary to overcome the protection that the Constitution affords to alien defendants. The Fifth Circuit's analysis is so obviously a correct application of the dictates of *Asahi* that review on certiorari would serve no purpose.

Jugometal suggests that the Fifth Circuit's refusal to mention in its opinion Jugometal's small commission on the sales of asbestos to Texas and the time lag between the last sale and the initiation of suit reflects its choice "to ignore concerns of fairness" which require recognition under *Asahi*. Neither Jugometal's small profit nor the latency of plaintiffs' claim, however, bear on the fairness or reasonableness of haling Jugometal into a Texas court to respond to a claim for injuries alleged to have resulted from a product that Jugometal intentionally shipped to Texas. Jugometal has cited, and the Irvings have found, no case in which the reasonableness of jurisdiction depended on whether the business venture conducted in the forum state was successful or profitable.[4] Jugometal's

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[3] *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex.1979).

[4] It must be remembered that although Jugometal's profits from its sales of asbestos to Texas may have been small, its gross sales of asbestos to Texas were enormous, averaging $250,000 per year over the length of its relationship with Huxley. While Jugometal forwarded most of the payments that it received for the asbestos to its supplier, Stragari Mines, the fact remains that payment for the asbestos was made to Jugometal, not Stragari, by the American buyer.

objection to defending a suit based on actions that it took long ago focusses on the time, and not on the place, of suit. If Jugometal's contacts are substantial enough to subject it to the jurisdiction of the Texas courts, the exercise of jurisdiction is not made unfair or unreasonable because the effects of Jugometal's tortious activity did not appear for several years.[5] The Fifth Circuit thus properly refused to consider these two facts, to which the district court referred and upon which Jugometal now relies, in evaluating the reasonableness of the exercise of jurisdiction over Jugometal by a Texas court.

Jugometal also urges the Court to review the Fifth Circuit's opinion to cure that court's refusal to discuss the "international ramifications of an exercise of jurisdiction as discussed by the district judge." Petition at 12. Specifically, Jugometal points out that while the district court discussed the possibility that the exercise of jurisdiction in this case may lead to "reciprocal relaxations" of jurisdictional standards, and noted the difficulties of language barriers and distance faced by Jugometal in defending this action in Texas, the Fifth Circuit's opinion is silent on these matters. The Irvings submit that the Fifth Circuit's silence was well-considered, because the district court's observations are unsound if not preposterous. The district court's proposition that a Texas court's assertion of

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[5] The courts have never applied a concept of laches to the exercise of personal jurisdiction. *See, e.g., Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 593 (5th Cir. 1969) (permitting the exercise of personal jurisdiction over an Oregon corporation by a Texas court even though the product upon which jurisdiction was based had been sold by the defendant twenty years before suit was filed).

jurisdiction over Jugometal, which purposefully shipped its product into Texas, may lead to a Yugoslavian court's legitimate exercise of jurisdiction over the Texas plaintiffs, whose only contact with Yugoslavia is their use of a Yugoslavian product after it was delivered to Texas, is so illogical as to require no discussion by the reviewing court. Similarly, the district court's concern about language barriers facing Jugometal, and Jugometal's anticipated difficulties in defending itself in a foreign legal system, is unjustified when Jugometal's course of conduct in the United States is analyzed. Jugometal did business directly with an American broker; executed the contract of sale in English; maintained an office for a period of time in New York; and, perhaps most importantly, agreed in the contract of sale to the application of American law and to the jurisdiction of American courts. Faced with these compelling facts, the Fifth Circuit properly chose not to discuss the factors deemed important by the district court.

The exercise of jurisdiction over Jugometal by a Texas court unquestionably comports with international standards for exercising jurisdiction over foreign defendants.[6]

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[6] *See, e.g., Reinwater Foundation v. Mines de Potasse d'Alsace, S.A.*, 1976 E.Comm.Ct.J.Rep. 1735, 1749, 1 COMMON MKT. L.R. 284, 301 (1977) (under the guidelines established by the European Economic Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, "the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage."). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §421(2)(j)(1987); H. TEBBEN, INTERNATIONAL PRODUCT LIABILITY 293 (1980).

Because of Jugometal's purposeful and continuous contacts with an American company and the state of Texas, the assertion of jurisdiction by a Texas court would not conflict with, or in any way threaten, Yugoslavia's sovereignty. Additionally, the fairness concerns raised by Jugometal are illusory. While the Fifth Circuit did not explicitly address every argument raised by Jugometal in its briefs or discussed by the district court and special master in their opinions, the court adequately considered all of the factors identified in *Asahi* in arriving at its proper conclusion that the assertion of personal jurisdiction over Jugometal by a Texas court does not offend due process notions of fair play and substantial justice.

III. THE JURISDICTIONAL CONSEQUENCES OF JUGOMETAL'S LIMITED OWNERSHIP INTEREST IN THE ASBESTOS SHIPPED TO TEXAS NEED NOT BE ANALYZED BY THIS COURT, SINCE, TAKEN AS A WHOLE, THE FACTUAL RECORD SUPPORTS THE EXERCISE OF JURISDICTION.

Jugometal suggests that this Court should exercise its power of review to consider the question of whether a broker, as opposed to a manufacturer or retailer, may be subject to the jurisdiction of the courts of the states that its products enter.[7] As the Fifth Circuit pointed out in its

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[7] The Irvings vigorously dispute Jugometal's contention that it cannot be considered the seller of the asbestos that injured Mr. Irving. The contract of sale unequivocally denotes Jugometal as the seller of the asbestos. The American buyer of the asbestos, Huxley, looked to Jugometal, and not to Stragari

(Continued on following page)

opinion, however, the characterization of Jugometal as a mere broker or intermediary, as opposed to a "seller" of the product on which jurisdiction is predicated, is a matter of semantics. Jugometal's proposed distinction begs the essential constitutional question of whether its purposeful contacts with Texas are sufficient to allow the courts of that state to exercise personal jurisdiction over it. This is a fact-specific inquiry that does not involve consequences extending beyond this particular case. Moreover, as explained in Part I, Jugometal's contacts with Texas are unquestionably sufficient to permit the exercise of jurisdiction. There is thus no need to address in depth Jugometal's sub-issue.[8]

(Continued from previous page)

Mines, for performance. Jugometal's rights and obligations vis-a-vis Stragari are of no concern to the Irvings, and have no relevance to the jurisdictional inquiry.

[8] Jugometal's discussion of *Ward v. Baltimore Stevedoring Co.*, 437 F.Supp. 941 (E.D.Pa. 1977) may be answered by citation to *Muller v. Temura Shipping Co.*, 629 F.Supp. 1024 (E.D.Pa. 1986), a case in which a Pennsylvania court exercised personal jurisdiction over a British cargo company because the company knew that its cargo would be discharged at the Port of Philadelphia. 629 F.Supp. at 1026-27. *Ward* and *Muller* make clear that the ability of a court to exercise jurisdiction over a defendant consistent with due process requirements depends on the defendant's involvement with the forum taken as a whole, not simply on whether the defendant has a technical ownership interest in the product entering the forum.

CONCLUSION

Jugometal has failed to present this Court with special and important reasons for granting a writ of certiorari. Granting the writ will not enable this Court to clarify the due process requirement of "minimum contacts," because the facts so clearly support the Fifth Circuit's finding that Jugometal engaged in purposeful activity in the forum that the "minimum contacts" prong is satisfied under any test. Moreover, review of the Fifth Circuit's conclusion that the exercise of jurisdiction over Jugometal is fair and reasonable will not involve development or refinement of legal principles, but will simply involve the application of those principles, announced by this Court in *Asahi* and followed by the Fifth Circuit below, to the unique facts of this particular case. For these reasons, Jugometal's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

I.

The Brief In Opposition is nothing more than a blatant attempt to mislead. Without any record support, Respondents equate Petitioner with a manufacturer or producer engaged in the business of "shipping" its "own products" to the port of Houston. As established in the Petition and left undisputed by the Brief In Opposition, Petitioner did not produce the product, was not its retailer or wholesaler and never had legal title or actual possession of it. At most, it performed the duties of what has historically been characterized as a forwarder of freight.[1]

[1] As described in Chicago, Milwaukee, St. P. & P. R.R. v. Acme Fast Freight, Inc., 336 U.S. 465, 484 (1949), those acting in this capacity

> arrange for the transportation by common carrier of the shipper's goods. The forwarder [does] not necessarily consolidate the individual consignments into carload lots, and its

The Special Master, District Judge and the lower court all agreed that the primary reason that Jugometal became involved in the Stragari/Huxley transaction was the fact that Yugoslavian law prohibited Stragari from exporting its own product.[2] It remains uncontested that the only reason Petitioner entered into a contract designating itself as "seller" was to comply with Yugoslavian law; that a second contract was entered into with Stragari, and that the latter rendered Stragari responsible under terms and conditions identical to those it would have undertaken but for the legal requirement that it employ an exporter licensed by the government of Yugoslavia.[3] It is also agreed that Jugometal never took actual possession or had legal title to the asbestos and that its gross income for the facilitating role it played in the Stragari/Huxley transaction over twenty-five years ago generated somewhere in the neighborhood of $2,500 to $3,750 per year.[4] Petition for Certiorari 4. Finally, laying aside inappropriate conclusory language employed in the Brief In Opposition,[5] the critical issue which brings this case to

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> duties, as agent of the shipper, [go] no farther than procuring transportation by carrier and handling the details of shipment. Forwarders of this type charge . . . fees for their services, which the shipper [pays] in addition to the freight charges of the carrier utilized for the actual transportation.

[2] App. 2a, 41a, 48a (adoption of findings of Special Master).

[3] Included were provisions ensuring that Stragari (not Jugometal) would be responsible for expenses incurred after title to the asbestos passed from Stragari to Huxley, *e.g.*, bag cleaning and testing. *Cf.*, Brief In Opposition 10 n.4 (acknowledging proposition that Jugometal was mere conduit for passage of funds from Huxley to Stragari).

[4] Income derived from the transaction is far less than that now expended to contest the jurisdiction of the district court.

[5] After characterizing Petitioner as a "foreign supplier," in the Questions Presented, Respondents argue a proposition finding no support in the opinions below or the record, that is, Jugometal "sold" and "shipped" "its products" to Houston. Brief in Opposi-

the certiorari stage remains the same as when the district-court determined that there was no jurisdiction: By signing the contract with Huxley (on behalf of Stragari), which included provisions with respect to testing and bag cleaning in the port city of Houston, and by fulfilling its obligation to arrange transportation from Yugoslavia to that port,[6] was Petitioner's "conduct and connection with the forum State . . . such that [it] should reasonably [have] anticipated being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

Reversing the Special Master and District Judge, the lower court found "no clear guidance" [7] from *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1988). Although there was no corporate activity by Petitioner in Houston, it concluded that "out-of-state activities can establish the necessary minimum contacts if those activities have 'reasonably foreseeable consequences' within the forum state." App. 7a.[8] As pointed out in the Petition for

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tion 2, 5. As explained in the Petition, Stragari and Huxley were the only entities having legal title and possession of the asbestos. Petition for Certiorari 4. At no point in the transaction did Petitioner have a relationship with the product warranting the characterizations employed by Respondents.

[6] Next to New York and New Orleans, Houston is the third largest commercial port in the United States. THE WORLD ALMANAC & BOOK OF FACTS 186 (1989).

[7] App. 6a.

[8] Citing Bean Dredging Corp. v. Dredge Technology, 744 F.2d 1081, 1083 (5th Cir. 1984). In addition to a clear rejection of the "stream of commerce" approach taken in *Bean Dredging* by four members of this Court in *Asahi*, the factual predicate, as applied to the instant case, is also erroneous. This case does not involve the mass distribution of a product that could wind up "anywhere." App. 9a. Rather, it involves a sale with the understanding that the product in question was to be used by only one business, the identity of which was withheld from Petitioner.

Certiorari, the determination that jurisdiction was properly asserted, brings directly into question the correct application of the "foreseeability" test as advanced by Justice Brennan, Petition For Certiorari 9 n.12. In addition, it squarely raises the issue of most pressing concern to the lower courts: after the four-four division in *Asahi*, does the Due Process Clause require certain "additional conduct" in the forum state before jurisdiction attaches?

Concerns of "fairness," *e.g.*, the passage of twenty-five years, destruction of corporate records pursuant to Yugoslavian regulations and the *de minimis* compensation which Petitioner received, played no part in the lower court's analysis. Moreover, in light of the near unanimous agreement in *Asahi* as to the importance of international ramifications, Respondents' contention that the lower court's "silence [on this issue] was well-considered" [9] is especially inappropriate.

Petitioner's involvement in the case was a direct result of compliance with provisions of Yugoslavian law. It was for this reason alone that Petitioner, a licensed exporter and acting only as an agent for Stragari, was designated as "seller" [10] in the contract with Huxley. But for the peculiar requirements of Yugoslavian law there would be no colorable claim as to jurisdiction. Accordingly, Yugoslavia's concerns as a sovereign with respect to its own laws and methods of engaging in international trade are now at risk. This case should, at the very least, be reviewed by this Court to explore the impact of international concerns on jurisdictional concepts as applied to foreign entities operating under the laws of their own countries.

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[9] Brief In Opposition 11.

[10] It is not disputed that at the time of entering into the 1959 contract, officers of Jugometal did so with the knowledge that pursuant to common business practices then in effect in Yugoslavia, the company was acting as an agent for Stragari.

II.

Since the decision in *International Shoe* v. *Washington*, 326 U.S. 310, 316 (1945), the concept of "fair play and substantial justice," requires that the relationship between a defendant and the forum be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." *World-Wide Volkswagen*, *supra* at 292. This case demands application of these principles in the context of putting in place definitive guidelines for those engaged in international trade. For the reasons set forth in the Petition and Reply Brief, the writ of certiorari should issue.

Respectfully submitted,

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